No. 126, Original

In The

Court of the United States

October Term, 1997

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA,

and

STATE OF COLORADO,

Defendants.

THE STATE OF NEBRASKA AND
ORAL ARGUMENT IN OPPOSITION
KANSAS' MOTION FOR LEAVE
FILE BILL OF COMPLAINT

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TABLE OF CONTENTS

Page

E OF CONTENTS i

X TO APPENDICES ii

E OF AUTHORITIES iv

UEST FOR ORAL ARGUMENT 1

TEMENT OF THE CASE 1

The Present Dispute 1

Development of the Republican River Basin 2

Beneficial Consumption 2

The Compact and Its Administration 3

MARY OF ARGUMENT 5

GUMENT 7

BRASKA'S CLAIMED VIOLATIONS AND KANSAS' ALLEGED INJURIES ARE NOT SPECIFIC ENOUGH OR OF SUFFICIENT MAGNITUDE TO JUSTIFY EXERCISING ORIGINAL JURISDICTION 7

A. This Court's Jurisdiction Should Be Invoked Only In The Most Serious Of Circumstances. 7

1. The Court's Gatekeeping Function 7

2. The Test for Invoking Original Jurisdiction 8

B. Kansas Does Not Plead Any Facts Which Establish That Its Rights Have Been Violated Or That It Has Been Injured By Nebraska.. 9

C. Kansas' Conclusory Allegations Of Injury Cannot Overcome Official Compact Data 10

1. Comparison of Water Deliveries to Kansas and Its Allocation 10

TABLE OF CONTENTS - Continued

Page

Comparison of Water Deliveries to Kansas and Its Actual Use 12

3. Federal Reservoir Data 13

4. Consumption by Nebraska 14

5. Kansas' Refusal to Participate in the Effective Administration of the Compact 16

D. Alternative Forums Exist To Resolve Kansas' Claims 17

1. United States District Court 17

2. Compact Alternatives 18

3. Mediation and Negotiation 19

CONCLUSION 21

APPENDIX A-1

INDEX TO APPENDICES

APPENDIX A: Affidavit of J. Michael Jess A-1

APPENDIX B: Graph Comparing Republican River Water Delivered to Kansas by Nebraska and Kansas' Mainstem Allocation A-6

APPENDIX C: Graph Comparing Republican River Water Delivered to Kansas by Nebraska and Kansas' Consumptive Use A-7

APPENDIX D: Graph Showing Annual Maximum Contents of Harlan County Reservoir A-8

TABLE OF CONTENTS - Continued

Page

APPENDIX E: Graph Showing Annual Maximum Contents of Lovewell Reservoir A-9

APPENDIX F: Graph Showing Annual Maximum Contents of Milford Reservoir A-10

APPENDIX G: Graph Showing Consumptive Water Use by Nebraska Within the Republican River Basin A-11

TABLE OF AUTHORITIES

CASES

Alabama v. Arizona, 291 U.S. 286 (1934)....

Arizona v. California, 283 U.S. 423 (1931)...

Arizona v. California, 373 U.S. 546 (1963)...

Bostwick Irrigation District v. United States, 900 F.2d 1285 (8th Cir. 1990)..... .....

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)

Kansas v. Colorado, 514 U.S. 673 (1995) ....

Maryland v. Louisiana, 451 U.S. 725 (1981) ...

Massachusetts v. Missouri, 308 U.S. 1 (1939) ...

Mississippi v. Louisiana, 506 U.S. 73 (1992) ...

Nebraska v. Wyoming, 325 U.S. 589 (1945) ...

Nebraska v. Wyoming, 515 U.S. 1 (1995) ....

New York v. New Jersey, 256 U.S. 296 (1921) ...

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) ...

Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945) ....

Texas v. New Mexico, 462 U.S. 554 (1983) ...

Weiland v. Pioneer Irrigation Co., 259 U.S. 498 (1922)

STATUTES AND RULES

28 U.S.C. § 1251(a) .....

Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193 (1972).....

Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943).....

REQUEST FOR ORAL ARGUMENT

The State of Nebraska opposes the Motion for [illegible] to File Bill of Complaint ("Motion") filed by the State of Kansas and respectfully requests oral argument.

STATEMENT OF THE CASE

1. The Present Dispute.

On May 26, 1998, the State of Kansas requested leave to commence an original action in this Court, alleging violations by Nebraska of the states' 1943 Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943) ("Compact"). Kansas alleges that Nebraska's consumptive use of the waters of the Republican River is exceeding its annual allocation, resulting in decreased river flows. According to Kansas, groundwater development in Nebraska has primarily led to this alleged overuse.

Yet, with the exception of one drought year, official reports adopted by the Republican River Basin Compact Commission ("Compact Commission") show that for more than 50 years Nebraska has faithfully and consistently delivered to Kansas more water than was allocated to it under the Compact. In its tendered Bill of Complaint, Kansas fails to state, except by way of conclusion, that any citizen or interest of Kansas has been damaged by any act of Nebraska or its citizens.

In light of the official statistics kept by the Compact's governing body, Kansas does not and cannot allege that it has ever beneficially consumed all of the water received in any year. For this reason alone, Kansas fails to allege

[illegible] of a magnitude sufficient to warrant exercise of the [illegible] original jurisdiction.

2. Development of the Republican River Basin.

When Nebraska, Kansas and Colorado adopted the Compact in 1943 the surface waters of the Republican River Basin ("Basin") were largely undeveloped. The purpose of the Compact was not to maintain this status quo, but to allocate the Republican River's water so that citizens of all three states could develop it for irrigation and other beneficial consumptive uses. The State of Kansas admits this basic interpretation of the Compact at page 5 of its Brief:

> [T]he surface waters of the Republican River Basin were largely undeveloped at the time the Republican River Compact was adopted in 1943. This lack of development on the Republican River is quite different from the situation in the Arkansas River Valley when the Arkansas River Compact was adopted. There the Arkansas River flows were already over-appropriated. 1 Special Master Report 55 (1994), *Kansas v. Colorado*, 514 U.S. 673 (1995). Thus, the purpose of the Republican River Compact was not to maintain the status quo, as it was for the Arkansas River Compact, *see id.*, at 89, but to provide a framework of State allocations within which development could take place.

3. Beneficial Consumption.

Through the Compact, Nebraska, Colorado and Kansas agreed that water in the Republican River would be

consumed through the activities of man." Compact, Art. II (emphasis added). Consumption, not navigation or other concerns, was the primary object of the Compact: "beneficial consumptive use is the basis and principle upon which the allocations of water" under the Compact are predicated. *Id.* Beneficial consumptive use means that water will be removed from and not returned to the river. *See Arizona v. California*, 373 U.S. 546, 557 n.23 (1963).

Pursuant to the Compact, each state has increased its beneficial consumptive use of Republican River water over the years. As the Compact contemplates, increased beneficial consumptive use has decreased river flows over time. The issues in this lawsuit are not whether flows have decreased or more wells have been drilled, but rather whether Kansas is receiving its allocation under the Compact and is putting the water it does receive to beneficial consumptive use.

4. The Compact and Its Administration.

In an effort to ensure an equitable apportionment of the river, the authors of the Compact estimated the Basin's "virgin water supply" originating in designated drainage sub-basins, and then allocated specific amounts to each state. The virgin water supply is defined as "the water supply within the Basin undepleted by the activities of man." Compact, Art. II.

The Compact grants Colorado the right to use 54,100 acre-feet of water annually, or 11 percent of the total virgin water supply. Nebraska's allocation is 49 percent of the supply, or 234,500 acre-feet of water per year. Kansas is allocated 190,300 acre-feet of water, or 40 percent of the

total supply. Compact, Art. IV. The sum of all three states' allocations accounts for the entire virgin water supply. The Compact anticipates that, at full development of the Basin, no unused water will be left over.

Kansas' allocation is derived from two distinct geographic areas: the first portion – 52,300 acre-feet of water – is allocated from those tributaries originating in Colorado which flow directly into Kansas. The remaining portion of Kansas' allocation – 138,000 acre-feet of water – is derived from the mainstem of the Republican River upstream of the Nebraska-Kansas state-line. *Id.*

The Compact clarifies that the specific allocations to Colorado, Kansas and Nebraska are "subject to such quantities being physically available. " *Id.* To accommodate the annual variability of the water supply, the Compact requires proportional adjustments to each state's allocation "[s]hould the future computed virgin water supply of any source vary more than ten (10) per cent. " Compact, Art. III.

Each year, representative Commissioners of Colorado, Kansas and Nebraska meet to retrospectively calculate the amount of virgin water supply, each state's allocation, and each state's usage for the prior year. Compact, Art. IX. Until 1996, when Kansas refused to participate with Nebraska and Colorado, the Compact states had collected, correlated, and unanimously approved the data necessary for the proper administration of the Compact. Appendix A to Nebraska's Brief, the affidavit of Nebraska's Compact Commissioner, sets forth the official Compact data central to the present dispute. Because Kansas adopted these official statistics, the Court should

examine them in deciding whether to grant original jurisdiction.

SUMMARY OF ARGUMENT

The claimed violations and purported damages asserted by Kansas do not justify invocation of the Court's original jurisdiction under the Court's test requiring examination of the "seriousness and dignity of the claim," and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

As a preliminary matter, Kansas does not plead any facts which establish that its rights under the Compact have been violated or that Kansas has been injured by Nebraska. No years of violation are specified, no amount of shortage is specified, and no allegation is made that all water currently received by the State of Kansas is put to beneficial use.

On the other hand, the official statistics adopted annually by the Compact Commission for the years 1959 through 1994 plainly demonstrate Kansas has suffered no injury. Kansas has received its full allocation of Republican River water *every year* since the Compact's adoption except the drought year of 1992. Furthermore, Kansas has never used all of the water it has received in any year. In fact, for the ten-year period of 1985 through 1994, Kansas failed to use an average of 228,000 acre-feet of water delivered each year by Nebraska. *See* Appendix A ¶ 5. By Kansas' own measure, *see* Kansas' Brief, n.1, this is enough water to fill the Supreme Court courtroom with

unused water 190 times every day for ten years. By any measure, Kansas has Republican River water to spare. Its Republican River reservoirs are full. Kansas has suffered no harm.

Official Compact data are not available after 1994, as the result of actions by Kansas. Specifically, at the annual Compact Commission meeting in 1996, Kansas refused to ratify figures for 1995. Official data are unavailable for 1996 and 1997, solely because Kansas refused, and continues to refuse, to provide necessary data to Nebraska and Colorado. Original jurisdiction should not be considered until Kansas provides data as required by the Compact – data that are needed by this Court to make a fully informed decision concerning the exercise of its original jurisdiction.

Alternatives to litigation before this Court also exist by which Kansas could resolve its present dispute with Nebraska. Specific alternatives include those identified in the Compact itself, such as litigation in federal district court, or the building of reservoirs to protect Kansas' allocation until the water may be put to beneficial use. Additionally, mediation and negotiation remain viable options should Kansas seriously desire more efficient administration of the Compact.

ARGUMENT

NEBRASKA'S CLAIMED VIOLATIONS AND KANSAS' ALLEGED INJURIES ARE NOT SPECIFIC ENOUGH OR OF SUFFICIENT MAGNITUDE TO JUSTIFY EXERCISING ORIGINAL JURISDICTION

A. This Court's Jurisdiction Should Be Invoked Only In The Most Serious Of Circumstances

1. The Court's Gatekeeping Function.

"[N]ot every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a state." *Alabama v. Arizona*, 291 U.S. 286, 292 (1934).

> In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. . . . We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system.

Texas v. New Mexico, 462 U.S. 554, 570 (1983). This Court exercises its original jurisdiction in only the "most serious of circumstances," because any lower threshold simply would be unworkable:

> The need for a less complaisant standard follows from our traditional reluctance to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, our jurisdiction is exclusive. Our requirement that leave be obtained before a complaint may be filed in an

original action, see this Court's Rule 17.3, serves an important gatekeeping function. . . .

Nebraska v. Wyoming, 515 U.S. 1, 8 (1995) (emphasis added); *see also Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). As the Court noted in *New York v. New Jersey*, 256 U.S. 296 (1921):

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

Id. at 309 (emphasis added).

2. The Test for Invoking Original Jurisdiction

This Court has focused on two factors in determining whether to accept or decline original jurisdiction:

> First, we look to "the nature of the interest of the complaining State," *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939); focusing on the seriousness and dignity of the claim, *City of Milwaukee, supra*, Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992).

Neither factor weighs in favor of granting Kansas leave to proceed. First, Kansas fails to allege any underlying facts establishing any actual injury, and thus fails to establish a justiciable controversy. Second, official Compact data establish that Kansas continues to receive its full allocation and, in any event, fails to beneficially

consume the vast majority of Republican River water delivered by Nebraska. Last, original jurisdiction is not warranted since reasonable alternatives are available to Kansas for resolution of its claims.

B. Kansas Does Not Plead Any Facts Which Establish That Its Rights Have Been Violated Or That It Has Been Injured By Nebraska

It is assumed that well-pleaded facts will generally be accepted as true for the purpose of determining whether this Court should exercise its original jurisdiction. Yet, with unsubstantiated and factually devoid allegations such as "Kansas has suffered grave and substantial injuries," *see* Kansas' Bill of Complaint ¶ 9, Kansas' bare notice pleading leaves this Court without factual allegations to support the granting of original jurisdiction. Although the conclusory allegations in Kansas' Bill of Complaint might be enough to avoid a motion to dismiss at the federal district court level, they are wholly insufficient when presented to this Court with the rights of sovereign states at issue. Indeed, the allegations fail even to establish a justiciable controversy: "To constitute such a [justiciable] controversy, it must appear that the complaining State has suffered a wrong through the action of the other State. " *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (denying leave, finding no controversy).

Kansas' Bill of Complaint, for example, fails to identify the years in which Kansas received less than its allocation of Republican River water, what Kansas' allocation for each of those years was, the amount of water Kansas received in any of those years, and whether Kansas beneficially used all of the water it did receive. In the absence

of specific allegations on these critical issues, the Court should decline to exercise its original jurisdiction. If Kansas has this information, it can file a new complaint containing specific allegations on these issues. If it does not have this information, it should be obtained by Kansas before this Court further considers original jurisdiction.

These basic facts are missing from Kansas' pleading for a reason. Official Compact data jointly adopted by Kansas, Colorado and Nebraska for the years 1959 through 1995 establish that Kansas has not sustained any injury. Data from other sources for the period of 1995 through 1997 establish that vast quantities of water continue to flow into Kansas from Nebraska. Finally, although Nebraska's legal position is that groundwater is not governed by the Compact, the factual data set forth in this Brief assumes that groundwater is included as Kansas alleges.

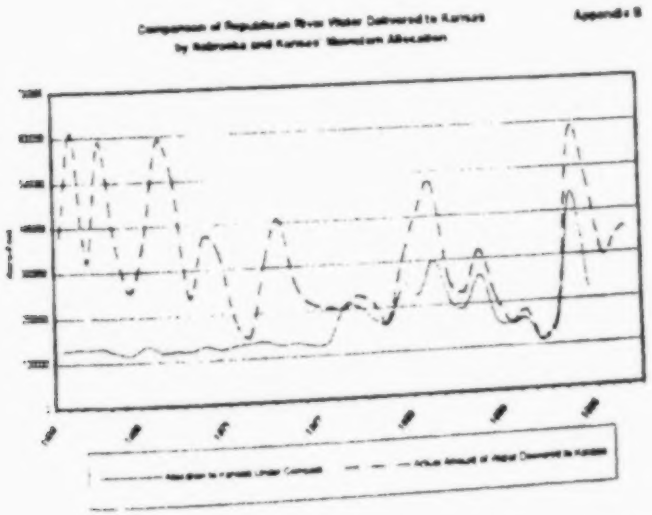
C. Kansas' Conclusory Allegations Of Injury Cannot Overcome Official Compact Data

1. Comparison of Water Deliveries to Kansas and Its Allocation.

Kansas cannot claim injury by Nebraska to that portion of its allocation derived downstream of the state-line, from tributaries within Kansas itself. Compact, Art. IV. Consequently, Nebraska's focus will be upon Kansas' remaining allocation derived from the mainstem of the river.

The following graph, reproduced as Appendix B to Nebraska' Brief, quantifies Kansas' mainstem allocation each year compared to the amount of water actually received from Nebraska. As indicated by Appendix A ¶ 6 the graph was compiled from official Compact calculations

approved by representatives of all three states at annual meetings of the Compact Commission until Kansas refused to participate. Thus, the line on the graph identifying Kansas' adjusted allocation stops at the year 1994. Subsequent data supplied by the United States Geological Survey for the years 1995, 1996 and 1997, were used to compute water deliveries to Kansas for these years. *Id.*



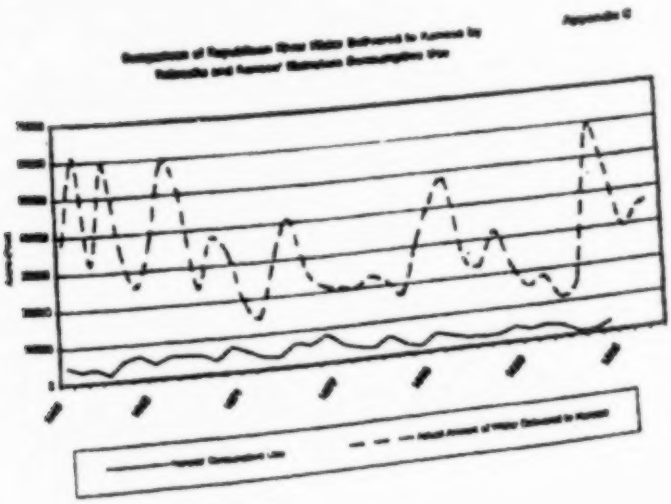
The foregoing graph shows that, over the 55-year history of the Compact, Kansas failed to receive its total allocation of water only one time, in the drought year of 1992. In addition, this graph demonstrates that, from 1959 through 1994, over five million acre-feet of water in excess of Kansas' annual mainstem allocation has flowed from Nebraska into Kansas. *Id.*

Importantly, the above graph includes official Compact data quantifying groundwater usage by the three states in determining Kansas' annual adjusted allocation.

Thus, even with the inclusion of groundwater usage official Compact data reveal that Kansas has received its allocation each year, with the exception of 1992. *See* Appendix A ¶¶ 2, 4.

2. Comparison of Water Deliveries to Kansas and Its Actual Use.

The following graph, reproduced as Appendix C to Nebraska's Brief, compares the amount of water delivered to Kansas each year with that amount beneficially consumed by Kansas. The graph was similarly created based upon official Compact figures adopted for the period of 1959 through 1994. *See* Appendix A ¶ 5. For the reasons previously mentioned, the line showing consumptive usage by Kansas stops after the year 1994. Again, data published by the United States Geological Survey were used to extend the line showing water deliveries by Nebraska to Kansas for the period of 1995 through 1997. *Id.*



Kansas has never consumed anywhere near as much water as was delivered to it. This was true even in the drought year of 1992. According to official Compact figures supplied by Kansas itself, Kansas consumed an average of 46,496 acre-feet of water delivered by Nebraska at the state-line annually from 1959 through 1994. *Id.* Over that same period, Nebraska delivered to Kansas an average of 315,690 acre-feet of water per year. *Id.* Accordingly, from 1959 through 1994, Kansas consumed 9.7 million acre-feet of water less than was delivered to it.

Kansas has suffered no injury. Its hollow claims fall short of the standard this Court set for interstate water disputes:

> [W]here the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable.

Nebraska v. Wyoming, 325 U.S. 589, 610 (1945). *See also id.* at 658 (Roberts, J., dissenting):

> [W]ater for beneficial use is what counts. No injury results from the deprivation of water unless a need is shown for that water for beneficial consumptive use at the time by the State claiming to have been wrongfully deprived of it. If water is not needed by downstream senior rights, the denial of water to upstream junior rights can result only in waste.

3. Federal Reservoir Data.

On page 4 of its Brief, Kansas suggests that the Kansas-Bostwick Irrigation District has suffered harm by

virtue of reduced flows into Harlan County Reservoir in Nebraska. This is Kansas' most specific argument, but it proceeds from the unfounded premise that this, or any other federal reservoir, was intended to fill every year.

Certain tributaries originating in Kansas also flow into the Harlan County Reservoir. The official Compact records demonstrate that Kansas *overconsumed* water from these tributaries by 240,650 acre-feet between 1966 and 1994. *See* Appendix A ¶ 9. To the extent that overconsumption has resulted in the Harlan County Reservoir filling less often, Kansas itself must be held accountable. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries to the [plaintiffs] were self-inflicted. ... No State can be heard to complain about damage inflicted by its own hand").

In any event, the three federal projects upon which Kansas might rely for water, Harlan County, Lovewell and Milford reservoirs, have normally been full in recent years. Appendix D to Nebraska's Brief shows that Harlan County Reservoir in Nebraska has filled each of the last six years. Appendix E shows that Lovewell Reservoir, located in Kansas, has filled every year since its construction. Appendix F shows that Milford Reservoir, also located in Kansas, has filled every year except 1988 and 1991. *See* Appendix A ¶ 8. There is no shortage of Republican River water in Kansas.

Compact data are available, 1992 through 1994. Nebraska consumed less than its allocation, even if groundwater use is included as Kansas alleges. *See* Appendix A ¶ 10. Other data provided by the United States Geological Survey show that 301,490 acre-feet of water were delivered to Kansas at the state-line in 1995, 346,570 acre-feet in 1996, and 373,360 acre-feet in 1997. *See* Appendix A ¶ 3. This exceeds Kansas' unadjusted mainstem allocation by a total of 607,420 acre-feet.

Nebraska cannot cite to official Compact figures for 1995. Nor does Nebraska know what Kansas' adjusted allocation was, or what Kansas' consumptive use was for 1996 or 1997, because Kansas will not provide the Compact Commission the data necessary to compute these figures. However, it is Nebraska's good faith belief that, for each of those years, Nebraska delivered more water to Kansas than the Compact requires and that vastly more water was delivered to Kansas than was put to beneficial consumptive use.

The need for the Court to demand more specific pleading from Kansas is particularly important here where the official Compact data adopted by representatives of all three of the states show that Kansas only failed to receive its full allocation in one year, has never put to beneficial consumptive use its full allocation and, for the 10-year period 1985 through 1994, failed to use an average of 228,000 acre-feet of water from the mainstem each year.

This Court need not, in the face of irrefutable statistics to the contrary from official Compact records, accept Kansas' unsupported assertions that Nebraska has

"fail[ed] to deliver water to Kansas in the quantities allocated under the Compact. " *See* Bill of Complaint ¶ 9 at 5-6. As stated by this Court:

> It is true . . . that a motion to dismiss, like a demurrer, admits every well-pleaded allegation of fact . . . But a court may take judicial notice [contrary to the allegation of fact, for example,] that a river within its jurisdiction is navigable.

Arizona v. California, 283 U.S. 423, 452 (1931).

Neither the resources of this Court nor several million dollars of attorney and expert witness fees or Special Master expenses should be consumed by Nebraska and Colorado until Kansas specifically alleges the years it has failed to receive its full allocation, the extent of the shortfall, and whether even in those years Kansas put to beneficial use all of the water which was received. Where a complaining state pleads no specific facts, and where official government data presented by the defendant state clearly show that no injury has occurred, this Court should not invoke its original jurisdiction.

5. Kansas' Refusal to Participate in the Effective Administration of the Compact.

The only reason that official Compact data do not exist for the years 1995, 1996 or 1997 is due to conduct by Kansas. Until 1996, when Kansas refused to participate further, the Compact Commission was able to quantify and publish data establishing the Basin's total virgin water supply, each state's adjusted allocation, water deliveries to each state, and consumptive use statistics for the previous year. Data for 1995 were not officially

adopted by the Compact Commission due to Kansas' refusal to recognize the figures that had been collected and correlated. Thereafter, as the result of Kansas' refusal even to share necessary data with Colorado or Nebraska for the years 1996 and 1997, the Compact Commission was unable to compute the total virgin water supply, each state's allocation, or the extent to which Kansas beneficially consumed the water delivered to it. *See* Appendix A ¶¶ 6, 7.

Kansas thus comes to the Court with "unclean hands" in this controversy:

> [W]hile "equity does not demand that its suitors shall have led blameless lives," (citation omitted), as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814-15 (1945).

D. Alternative Forums Exist To Resolve Kansas' Claims

1. United States District Court.

Kansas' most specific argument involves alleged water shortages experienced by the Kansas-Bostwick Irrigation District ("District"). Even if the District has an actionable claim for damages, that does not necessitate the State of Kansas bringing an original action before this Court.

The District is, after all, a political subdivision of Kansas to which this Court owes no exclusive original jurisdiction under 28 U.S.C. § 1251(a).

> [A] political subdivision in one State would be able to bring an action founded upon diversity jurisdiction. . . . We therefore conclude that the term "States" as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions. . . .

Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972).

Consequently, the District has the right to commence an action in federal district court if there is cause to believe that any Nebraska state or local official, entity or citizen has interfered with the District's water delivery contracts with the federal government. *Id.* This Court's original jurisdiction simply does not exist to resolve claims made by a state on behalf of individual citizens. *See Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens").

2. Compact Alternatives.

The Compact itself suggests alternatives to an original action before this Court. Article V of the Compact adopts as binding the "judgment and all provisions" of *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922). That case, by "citizens and officers of the state of Colorado" against "a corporation organized under Nebraska laws," was not an original action, but commenced in the United States District Court for the District of Colorado. *Weiland*

315 at 699. Similarly, if Kansas claimed injury is attributable to the operation of the reservoirs noted above, the contract with the federal government may be subject to a declaratory judgment action. See e.g. Bostwick Irrigation District v. United States, 900 F.2d 1285 (8th Cir. 1990). If there are, in fact, actual citizens of Kansas who have been damaged as the result of alleged Compact violations in Nebraska, they may likewise seek redress in a federal district court.

Another alternative to United States Supreme Court litigation is provided in Articles VI and VII of the Compact. These Compact provisions allow Kansas to construct storage reservoirs in Nebraska and Colorado to protect its allocation until such time as the water may be beneficially used. Yet, Kansas has never taken advantage of this alternative to litigation.

3. Mediation and Negotiation.

Nebraska additionally remains open to mediation and negotiation in order to avoid the expense of original action litigation before this Court. Any differences between the two states concerning administration of the Compact are more likely to be satisfactorily resolved in that manner.

> Time and again we have counseled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally

> interested in it than by proceedings in any court however constituted" (citation omitted).

Texas v. New Mexico, 462 U.S. 554, 575 (1983).

Though official Compact figures do not support Kansas' claims of injury, even with the quantification of groundwater usage, Nebraska officials have endeavored to maintain an open dialogue with their Kansas counterparts. Groundwater pumping, Kansas' principal grievance, is not a subject of the Compact, as the Appendix delivered by Kansas reveals. Its omission is telling. *Compare* Kansas-Nebraska Big Blue River Compact Art. III (3.4):

> In order to provide a sound basis for carrying out this Compact, the Administration shall cause to be established groundwater observation wells and collect such data therefrom as are necessary for evaluating the effects of pumping of wells.

Pub. L. No. 92-308, 86 Stat. 193 (1972). Nevertheless, Nebraska has conducted itself in a statesman-like manner, initiating virtually every public meeting and effort at resolution identified in Kansas' Brief in an effort to understand Kansas' concerns. Nebraska, not Kansas, suggested, pursued, and facilitated negotiations; Kansas admits ending them. *See* Kansas' Brief at 10. Kansas has for three years running also refused to ratify or deliver Compact statistics vital to effectuate the terms of the Compact.

Kansas' overall conduct supports the inference that it has not yet genuinely entertained any solution or alternative to an original action in this Court. Instead, Kansas has artificially created its own argument that this Court's jurisdiction is a matter of necessity. *See Mississippi v.*

Louisiana, 506 U.S. 73, 76 (1992) ("[O]ur original 'jurisdiction . . . was not contemplated that it would be exercised save when the necessity was absolute' " (citation omitted)).

Kansas and Nebraska each has a pending case on this Court's docket of interstate water suits. *See Kansas v. Colorado*, 514 U.S. 673 (1995); *Nebraska v. Wyoming*, 515 U.S. 1 (1995). Nebraska has urged Kansas to resume further negotiations to avoid the momentous cost of yet another such dispute.

> [I]t is difficult to believe that the bona fide differences in the two States' views of how much water Texas is entitled to receive justify the expense and time necessary to obtain a judicial resolution of this controversy.

Texas v. New Mexico, 462 U.S. 554, 576 (1983).

The citizens of both States would be better served if the expense, time and uncertainty of protracted litigation could be avoided through good faith negotiations. At a minimum, good faith efforts in that direction should be demonstrated by a potential state-plaintiff before the granting of original jurisdiction.

CONCLUSION

The State of Nebraska respectfully requests that Kansas be denied leave to commence an original action for these fundamental reasons:

1. Kansas' factually devoid, unsupported allegations of injury are insufficient to justify original jurisdiction in

the face of official Compact data that clearly show[s] [t]here has been no injury.

2. Kansas' Motion should be rejected due to Kansas' failure to meet its obligation in recent years to provide data to the Compact Commission, data which are needed for the effective administration of the Compact and data which this Court needs to make a fully informed decision on the exercise of its original jurisdiction.

If, after reviewing the briefs of the parties, important points remain unclear to the Court, Nebraska requests that Kansas' Motion be set for oral argument.

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July 1998

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APPENDIX

No. 126, Original

In the

Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA,

and

STATE OF COLORADO,

Defendants.

AFFIDAVIT OF J. MICHAEL JESS

STATE OF NEBRASKA)
) ss
COUNTY OF LANCASTER)

J. MICHAEL JESS, B.S., M.S., P.E., being first duly sworn, deposes and states:

1. I am the Director of the Nebraska Department of Water Resources and have served in that capacity since 1981. I received Bachelor of Science and Master of Science degrees in Engineering from the University of Nebraska-Lincoln, and am a registered Professional Engineer. As part of my duties as Director for the Department of Water

2. I serve as the Nebraska Commissioner to the Republican River Basin Compact Commission ("Compact Commission"). Since my appointment as Director, I have attended every Compact Commission meeting with the exception of the 1991 meeting.

As the Nebraska Commissioner I have reviewed the annual reports ("Compact Reports") submitted by the Engineering Committee of the Compact Commission. The Compact Reports include, among other things, the official annual estimates of the virgin water supply, reported consumptive use of surface and groundwater, and water allocations for each of the States of Colorado, Nebraska and Kansas, the parties to the Republican River Compact ("Compact"). Such reports are available for the period of 1950 through 1994.

3. I also have reviewed data developed by the United States Geological Survey which can be used to quantify the amount of water passing from the State of Nebraska to the State of Kansas for the years 1995, 1996 and 1997. These data show that 301,490 acre-feet of water were delivered to Kansas at the Nebraska-Kansas state line in 1995, 346,570 acre-feet in 1996, and 373,360 acre-feet in 1997.

4. Appendix B to Nebraska's Brief, attached hereto, is a hydrograph created from the Compact Reports and United States Geological Survey data which illustrates the volume of water passing from the State of Nebraska to the State of Kansas on an annual basis for the period of 1959 through 1997, as well as Kansas' mainstem allocation for the period of 1959 through 1994. The Compact

failed to receive its total mainstem allocation only one time in 1992, a drought year, even with the inclusion of groundwater usage factored into the virgin water supply formula. Based on figures contained in the Compact Reports, and United States Geological Survey stream ganging data, over five million acre-feet of water in excess of Kansas' annual mainstem allocation has flowed from Nebraska into Kansas from 1959 through 1994.

5. Appendix C to Nebraska's Brief, attached hereto, is a hydrograph created from the Compact Reports and United States Geological Survey data which illustrates the volume of water passing from the State of Nebraska to the State of Kansas on an annual basis for the period of 1959 through 1997, as well as the amount of water Kansas reported to have consumptively used from this supply during the period 1959 through 1994. Based on figures supplied by Kansas and adopted by the Compact Commission, Kansas consumed an average of 46,496 acre-feet of water annually delivered by Nebraska from 1959 through 1994. Over the same period, Nebraska delivered to Kansas an average of 315,690 acre-feet per year. For the ten-year period of 1985 through 1994, the Compact Reports and United States Geological Survey data show Kansas failed to use an average of 228,000 acre-feet of the water delivered each year by Nebraska.

Appendices B and C do not include information to show Kansas' annual allocation or consumptive uses for the years 1995, 1996 or 1997. Data are unavailable in an official format to compute Kansas' annual allocation and consumptive uses for this three-year period, as a result of the actions of Kansas' Compact Commissioner.

7. I was present at the 1996 meeting of the Compact Commission at which the Kansas Commissioner refused to adopt official Compact figures covering the period of 1995. I was also present at subsequent annual meetings of the Compact Commission in 1997 and 1998 at which the Kansas Commissioner and Kansas Engineer representative refused to supply basic data necessary to compute the Republican River Basin's total virgin water supply, each state's allocation, or Kansas' consumptive use for the years 1996 and 1997 as required by the Compact Commission for administering the Compact.

8. Appendix D to Nebraska's Brief, attached hereto, is a hydrograph created with data available from the United States Geological Survey and from the Nebraska Department of Water Resources. Appendices E and F to Nebraska's Brief, attached hereto, are hydrographs created with data available from only the United States Geological Survey. The hydrographs illustrate the maximum volume of water impounded each year in three particular reservoirs. For reference, the top elevation of the conservation pool in each is depicted with a horizontal line. The referenced reservoirs, Harlan County, Lovewell and Milford, are those federally-constructed projects upon which Kansas might rely for water deliveries.

9. Certain tributaries originating in Kansas flow into the Harlan County Reservoir. Compact Reports indicate that Kansas overconsumed water from these tributaries by 240,650 acre-feet between 1966 and 1994.

10. Appendix G to Nebraska's Brief, attached hereto, is a hydrograph [illegible] from the Compact

Reports, which shows that in each of the last three years for which official Compact data are available (1992 through 1994), Nebraska has consumed less water than its allocation under the Compact, even if groundwater usage is included in the computation.

IN WITNESS HEREOF, I hereunto set my hand at Lincoln, Nebraska, this 22 day of July, 1998.

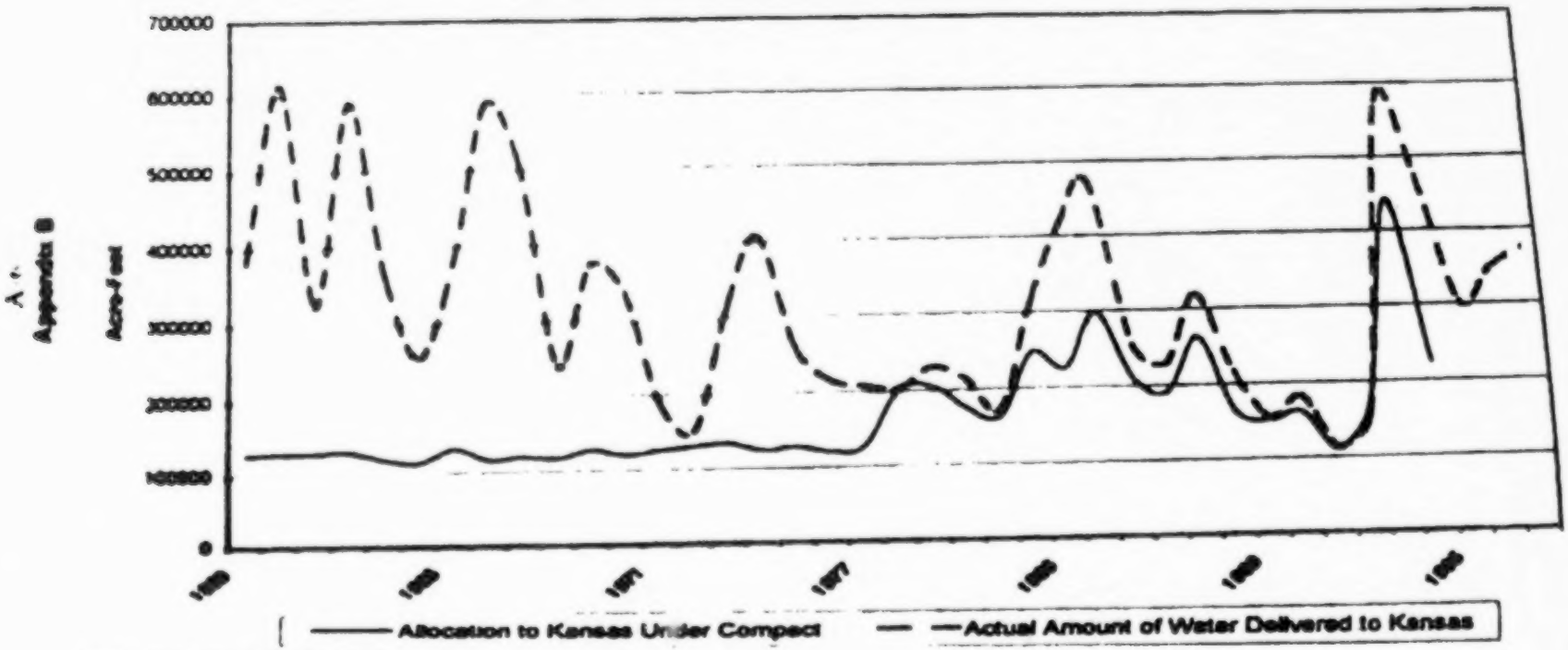
J. MICHAEL JESS, B.S., M.S., P.E.
Director, Department of Water Resources
State of Nebraska

SUBSCRIBED AND AFFIRMED before me this 22 day of July, 1998.

SEAL

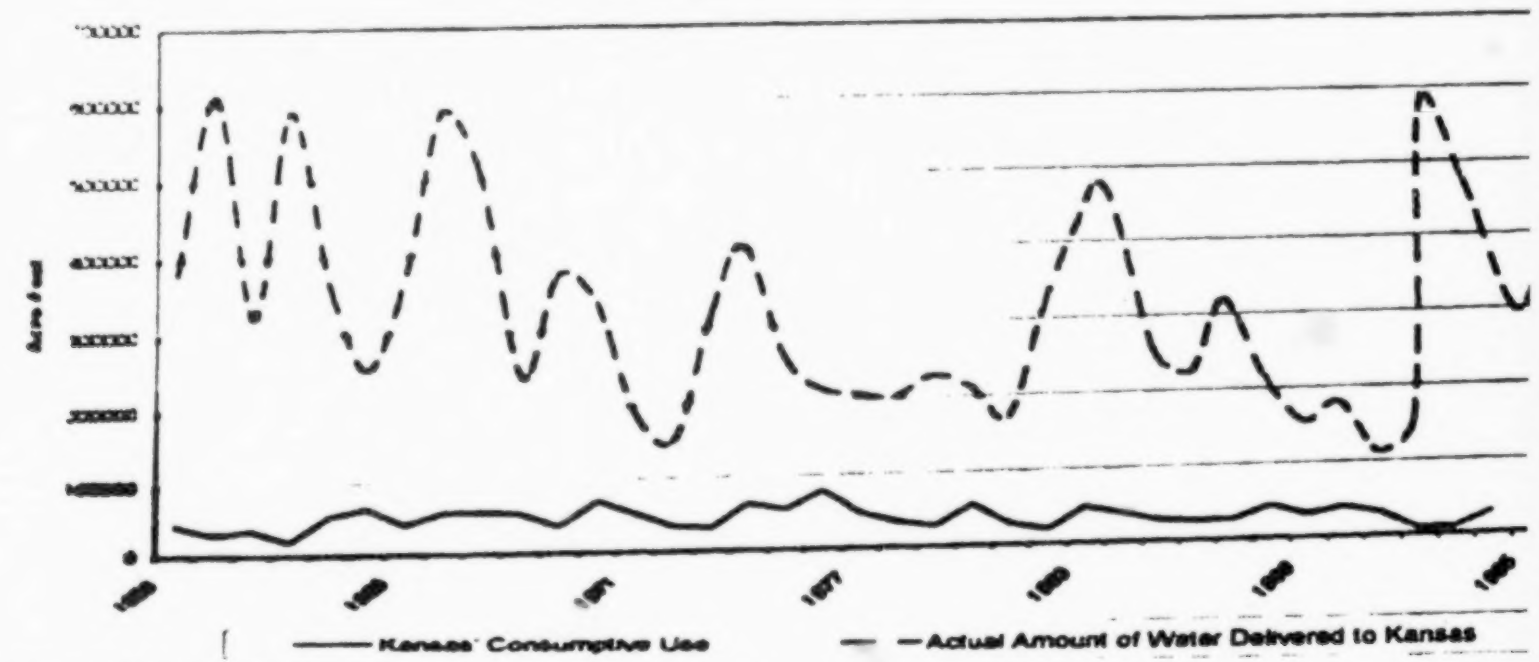
Deborah A. Bundiola
Notary Public

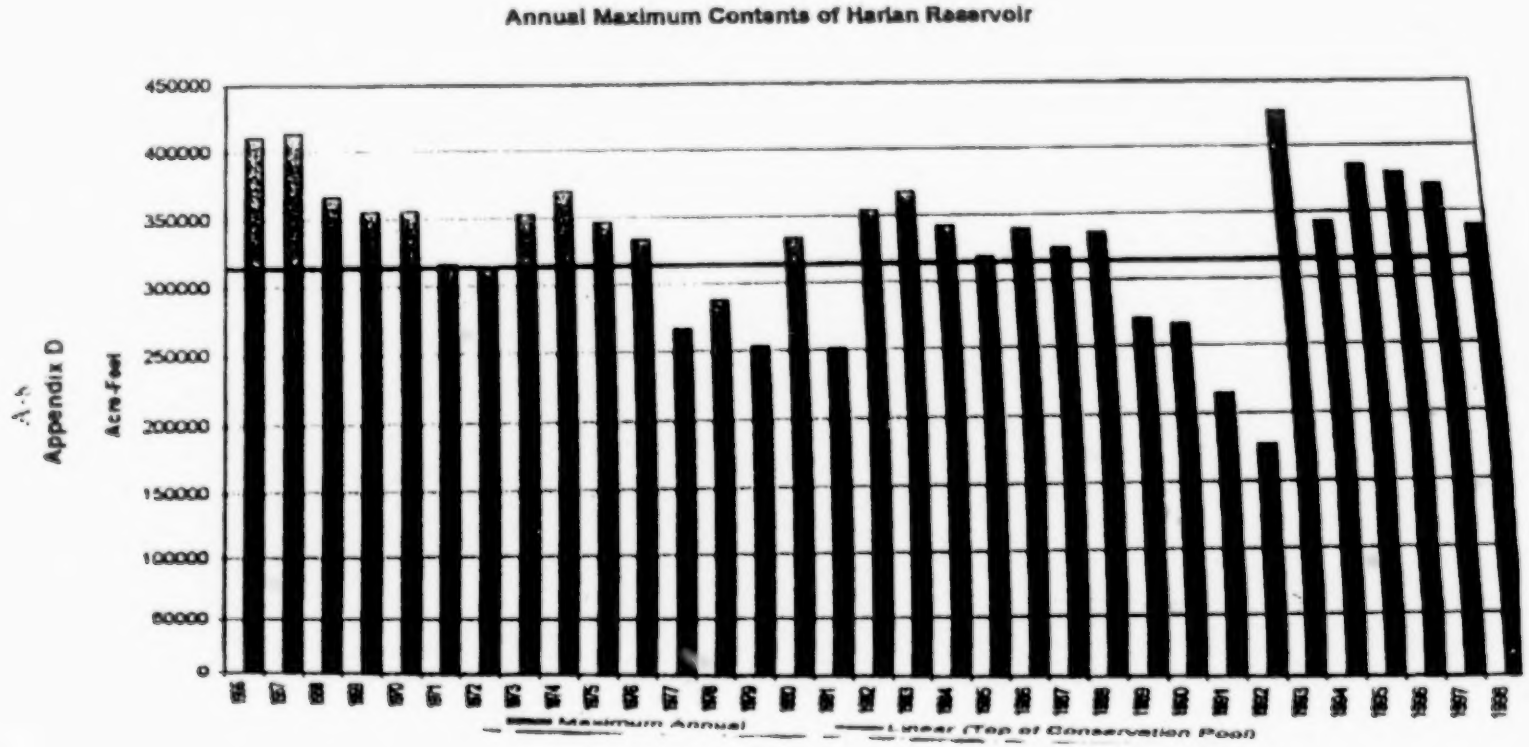
Comparison of Republican River Water Delivered to Kansas
by Nebraska and Kansas' Mainstem Allocation

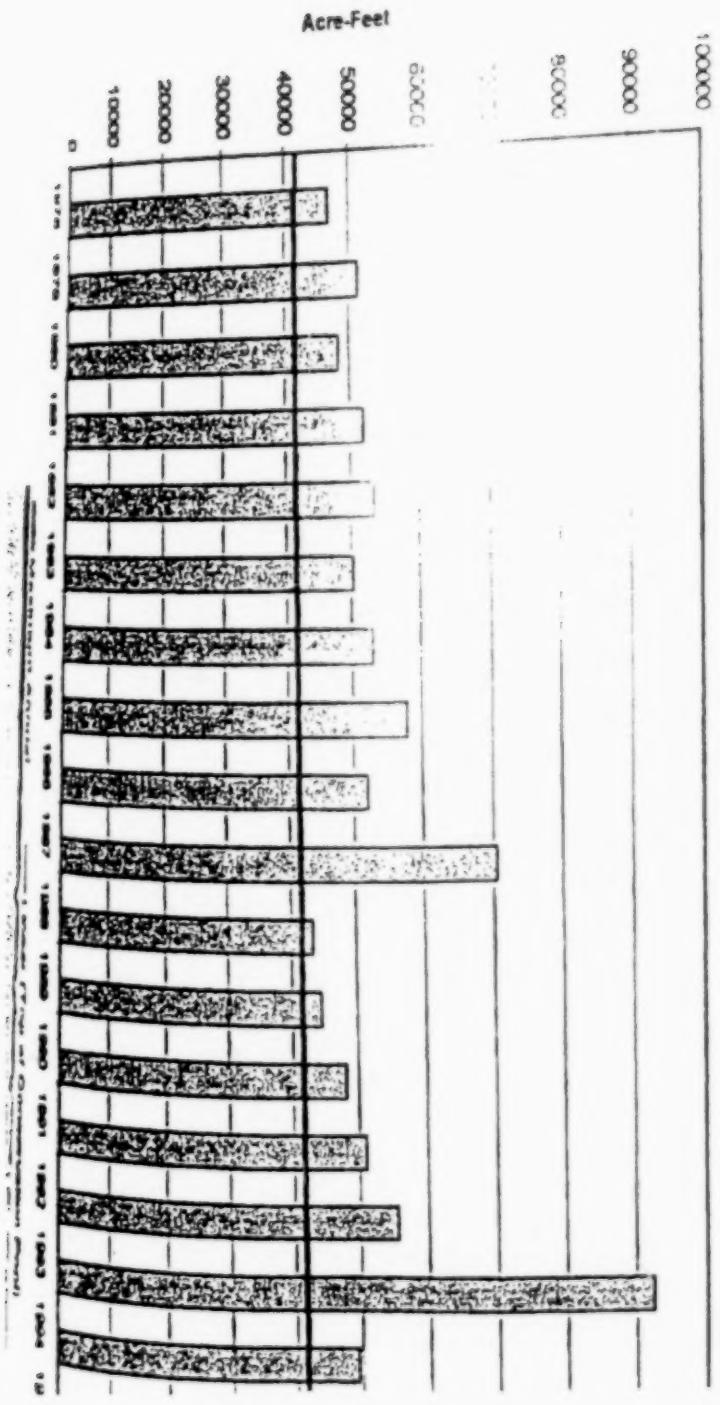


1950s 1954 Official Compact Data
1960s 1967 U.S. Geological Survey Data was used to measure state-line flows of water delivered to Kansas
1980s 1987 Harmas allocation is not represented on the graph because of Harmas' refusal to ratify/share data

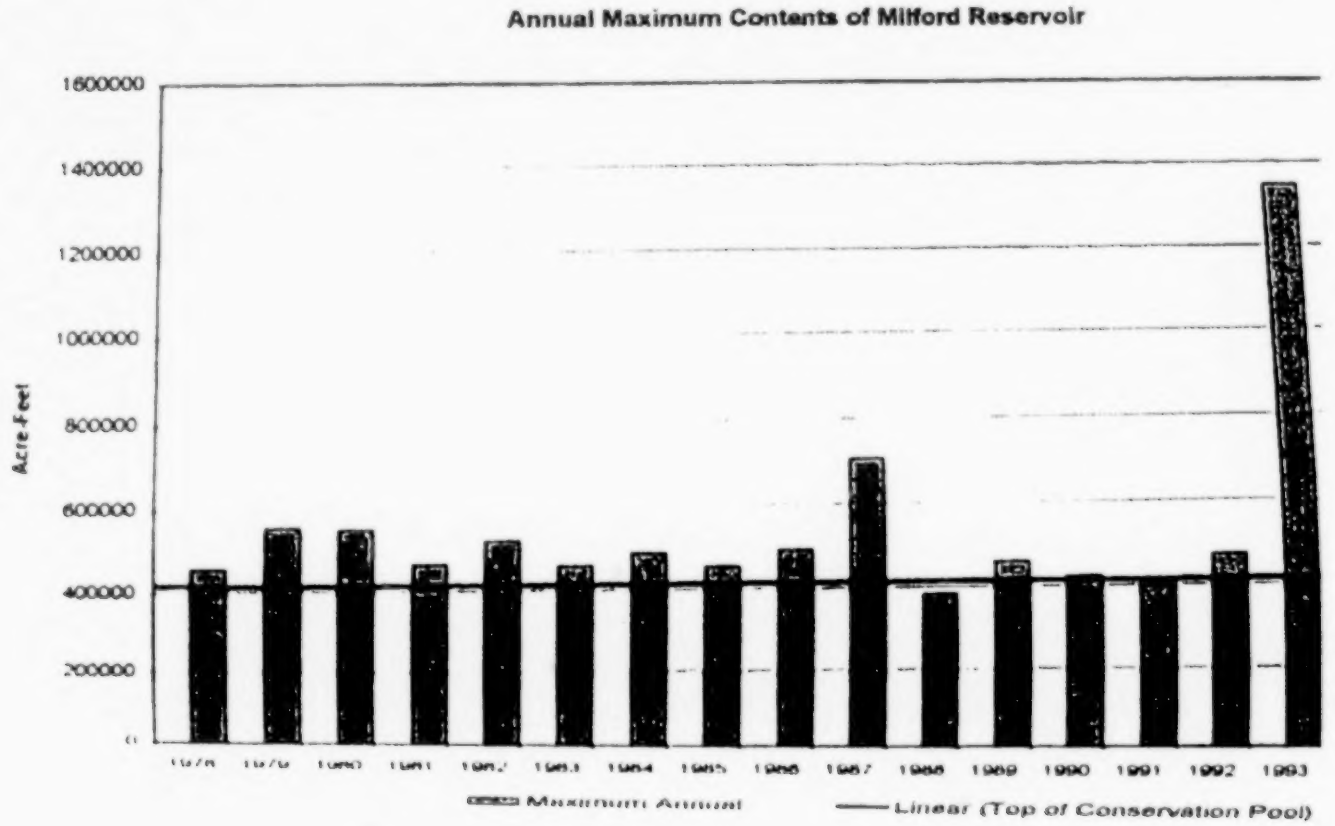
Comparison of Republican River Water Delivered to Kansas by
Nebraska and Kansas' Mainstem Consumptive Use




Annual Maximum Contents of Harlan Reservoir
Acre-Feet
450000
400000
350000
300000
250000
200000
150000
100000
50000
0
Maximum Annual
Linear (Top of Conservation Pool)



Annual Maximum Contents of Lovewell Reservoir


Annual Maximum Contents of Milford Reservoir
Acre-Feet
1600000
1400000
1200000
1000000
800000
600000
400000
200000
0
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
Maximum Annual
Linear (Top of Conservation Pool)

Appendix G

Consumptive Water Use By Nebraska Within the Republican River Basin (Acre Feet)